

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,  
R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF  
FIGR BRANDS, INC., FIGR NORFOLK INC.  
AND 1307849 B.C. LTD.**

Applicants

**FACTUM OF THE APPLICANTS  
(Norfolk KERP and Stay Extension Order)**

August 20, 2021

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## FACTUM OF THE APPLICANT

### PART I: OVERVIEW

1. FIGR Brands, Inc. ("**FIGR Brands**"), FIGR Norfolk Inc. ("**FIGR Norfolk**"), and 1307849 B.C. Ltd. ("**Residual Co**", and together with FIGR Brands and FIGR Norfolk, the "**Applicants**" or the "**FIGR Group**") are seeking, under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), an order (the "**Norfolk KERP and Stay Extension Order**"), *inter alia*:

- (a) approving an extension of the Stay Period (as defined below) to and including October 29, 2021 (the "**Stay Extension**");
- (b) approving a key employee retention plan for certain senior employees of FIGR Norfolk (the "**Norfolk KERP**") and sealing the Confidential Appendix (as defined below);
- (c) approving the Sixth Report of FTI Consulting Canada Inc. ("**FTI**") in its capacity as court-appointed monitor (in such capacity, the "**Monitor**") dated August 19, 2021 (the "**Sixth Report**"), and the activities of the Monitor described therein; and
- (d) approving the fees and disbursements of the Monitor and its counsel as set out in the fee affidavits attached to the Sixth Report.

### PART II: FACTS<sup>1</sup>

2. The facts underlying this motion are more fully set out in the affidavit of Michael Devon sworn August 17, 2021 (the "**August 17 Affidavit**") and the Sixth Report.<sup>2</sup> All capitalized terms used but not defined herein have the meanings ascribed to them in the August 17 Affidavit.

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<sup>1</sup> Note that any reference herein to the FIGR Group or the Applicants prior to June 28, 2021, being the closing of the CIG Transaction, includes CIG (each as defined below) and not Residual Co.

<sup>2</sup> Affidavit of Michael Devon sworn August 17, 2021 [August 17 Affidavit]; Sixth Report of the Monitor dated August 19, 2021 [Sixth Report].

**A. Background to the Need for CCAA Protection and the Granting of the Initial Order**

3. The FIGR Group operated two (2) licensed cannabis facilities – one in Simcoe, Ontario and the other in Charlottetown, Prince Edward Island. Since commencing operations, both facilities were cash flow negative and were dependent on certain of the Applicants affiliate companies for funding. The cannabis facility in Charlottetown, Prince Edward Island was sold in these CCAA Proceedings as part of the CIG Transaction (as defined below).<sup>3</sup>

4. Facing significant liquidity issues, potential enforcement action from certain of its creditors and the cessation of its business, the sought protection under the CCAA. To that end, on January 21, 2021, the Applicants sought and obtained the initial order (the "**Initial Order**").<sup>4</sup>

5. Among other things, the Initial Order:

- (a) granted a stay of proceedings until January 31, 2021 (as extended from time to time, the "**Stay Period**");
- (b) appointed FTI as Monitor;
- (c) approved the Applicants' ability to borrow under a debtor-in-possession credit facility (the "**DIP Loan**"); and
- (d) granted the following charges (collectively, the "**Charges**") over the Applicants' Property: (i) the Administration Charge; (ii) the Directors' Charge; (iii) the DIP Lender's Charge; and (iv) the Intercompany Charge.<sup>5</sup>

6. On January 29, 2021, the Applicants obtained an amended and restated Initial Order which, among other things:

- (a) increased the Directors' Charge and the DIP Lender's Charge to \$2,700,000 and \$8,000,000 (plus interest and costs), respectively; and

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<sup>3</sup> August 17 Affidavit, *ibid* at para 5; Sixth Report, *ibid* at para 17.

<sup>4</sup> August 17 Affidavit, *ibid* at para 6; Sixth Report, *ibid* at para 1.

<sup>5</sup> August 17 Affidavit, *ibid* at para 7; Sixth Report, *ibid* at para 2.

- (b) extended the Stay Period to and including March 31, 2021.<sup>6</sup>
7. On January 29, 2021, the Applicants also sought and obtained an Order approving a sale and investor solicitation process (the "**SISP**").<sup>7</sup>
8. On February 22, 2021, the Court granted an Order (the "**Claims Procedure Order**") which, among other things, approved a process for the solicitation, identification, determination and adjudication of claims against the FIGR Group and their present and former Directors and Officers (the "**Claims Procedure**"). The Claims Procedure excluded employee claims.<sup>8</sup>
9. On February 22, 2021, the Court also granted an Order which, among other things:
- (a) approved a key employee retention plan for certain management and operations staff of Canada's Island Garden Inc. ("**CIG**");
  - (b) extended the Stay Period until April 30, 2021;
  - (c) approved the Pre-Filing Report of the Monitor dated January 21, 2021, the First Report of the Monitor dated January 27, 2021 and the Second Report of the Monitor dated February 18, 2021 (the "**Second Report**") and the activities of the Monitor set out therein; and
  - (d) approved the fees and expenses of the Monitor and its counsel, Cassels Brock & Blackwell LLP ("**Cassels**"), as set out in the Second Report.<sup>9</sup>
10. On March 31, 2021, the Court granted an Order which, among other things:
- (a) authorized the execution of the first amendment to the DIP Commitment Letter which increased the maximum borrowings available under the DIP Loan up to \$13,000,000 (which was an increase of \$5,000,000) and authorized a corresponding increase to the DIP Lender's Charge; and

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<sup>6</sup> August 17 Affidavit, *ibid* at para 8; Sixth Report, *ibid* at para 3.

<sup>7</sup> August 17 Affidavit, *ibid* at para 10; Sixth Report, *ibid*.

<sup>8</sup> August 17 Affidavit, *ibid* at para 11; Sixth Report, *ibid* at para 4.

<sup>9</sup> August 17 Affidavit, *ibid* at para 12; Sixth Report, *ibid*.

- (b) approved the Third Report of the Monitor dated March 26, 2021, the activities referred to therein and the fees and disbursements of the Monitor and its counsel.<sup>10</sup>
11. On April 30, 2021, the Court granted:
- (a) an Order (the "**Employee Claims Procedure Order**") which, among other things, established a procedure for the identification, determination and adjudication of Employee Claims (as defined in the Employee Claims Procedure Order) against the FIGR Group and their current and former Directors and Officers (each as defined in the Employee Claims Procedure Order) (the "**Employee Claims Procedure**"); and
  - (b) an Order which, among other things, extended the Stay Period until and including June 30, 2021, approved the Fourth Report of the Monitor dated April 27, 2021 (the "**Fourth Report**") and the activities set out therein and approved the fees and disbursements of the Monitor and its counsel, Cassels, as set out in the Fourth Report.<sup>11</sup>
12. On June 10, 2021, the Court granted an order (the "**CIG Approval and Vesting Order**") which, among other things:
- (a) approved the sale transaction (the "**CIG Transaction**") contemplated by a subscription and share purchase agreement (the "**CIG Subscription and Share Purchase Agreement**") between FIGR Brands, as vendor, CIG, as the purchased entity (in such capacity, the "**Purchased Entity**") and 102604 P.E.I. Inc., as the purchaser (the "**CIG Purchaser**"), and vesting in the CIG Purchaser all of FIGR Brands' right, title and interest in and to all issued and outstanding shares in the Purchased Entity;

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<sup>10</sup> August 17 Affidavit, *ibid* at para 13; Sixth Report, *ibid* at para 5.

<sup>11</sup> August 17 Affidavit, *ibid* at paras 14 and 15; Sixth Report, *ibid* at para 6.

- (b) added a subsidiary of FIGR Brands, namely Residual Co, incorporated under the laws of British Columbia, as an Applicant in these CCAA Proceedings in order to effectuate the CIG Transaction;
- (c) removed CIG as an Applicant in these CCAA Proceedings upon closing of the CIG Transaction and deeming CIG to be released from the purview of the Initial Order and all other orders of the Court granted in these CCAA Proceedings; and
- (d) transferred and vested the Excluded Liabilities, the Excluded Assets and Excluded Contracts (each as defined in the CIG Subscription and Share Purchase Agreement) to Residual Co on or before closing such that the Excluded Liabilities became liabilities of Residual Co and not liabilities of CIG or the Purchased Entity.<sup>12</sup>

13. On June 10, 2021, the Court also granted an order (the "**Norfolk Approval and Vesting Order**" and together with the CIG Approval and Vesting Order, the "**Approval and Vesting Orders**") which, among other things, approved the sale transaction (the "**Norfolk Transaction**" and together with the CIG Transaction, the "**Transactions**") contemplated by the asset purchase agreement between FIGR Norfolk, as vendor, and 11897985 Canada Inc. (dba) BEROXFOOD North America, as purchaser (the "**Norfolk Purchaser**"), dated May 10, 2021 (the "**Norfolk Sale Agreement**"), and upon closing will vest in the Norfolk Purchaser, or as it may direct in accordance with the Norfolk Sale Agreement, all of FIGR Norfolk's right, title and interest in and to the property described in the Norfolk Sale Agreement.<sup>13</sup>

14. On June 10, 2021, the Court granted a further order (the "**June Ancillary Order**") which, among other things:

- (a) extended the Stay Period until and including September 3, 2021;
- (b) authorized the execution by the Applicants of the Second Amendment to the DIP Commitment Letter, which, among other things, increased the maximum borrowing available under the DIP Loan up to \$16,000,000 (which was an increase of

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<sup>12</sup> August 17 Affidavit, *ibid* at para 16; Sixth Report, *ibid* at para 7.

<sup>13</sup> August 17 Affidavit, *ibid* at para 17; Sixth Report, *ibid*.

\$3,000,000). The June Ancillary Order also authorized a corresponding increase to the DIP Lender's Charge;

- (c) authorized and empowered the Applicants to make, or cause to be made, distributions from time to time to the DIP Lender in repayment of the obligations secured by the DIP Lender's Charge;
- (d) approved the Pre-filing Intercompany Claims Resolution Process;
- (e) approved the Fifth Report of the Monitor dated June 4, 2021 (the "**Fifth Report**") and the activities of the Monitor described therein; and
- (f) approved the fees and disbursements of the Monitor and its counsel as set out in the Fifth Report.<sup>14</sup>

15. The CIG Transaction closed on June 28, 2021, however, the Norfolk Transaction has yet to close.<sup>15</sup>

**B. The Claims Procedure and Employee Claims Procedure<sup>16</sup>**

16. The Monitor continues to carry out the Claims Procedure and the Employee Claims Procedure in accordance with the Claims Procedure Order and the Employee Claims Procedure Order, as applicable.<sup>17</sup>

17. The Monitor continues to review, determine and adjudicate certain outstanding secured and unsecured Claims filed in accordance with the Claims Procedure Order and identify, determine and adjudicate Employee Claims in accordance with the Employee Claims Procedure Order.<sup>18</sup>

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<sup>14</sup> August 17 Affidavit, *ibid* at para 18; Sixth Report, *ibid*.

<sup>15</sup> August 17 Affidavit, *ibid* at para 19; Sixth Report, *ibid* at para 17.

<sup>16</sup> Capitalized terms not otherwise defined in this section have the meaning ascribed to them in the Claims Procedure Order or the Employee Claims Procedure Order, as the case may be.

<sup>17</sup> August 17 Affidavit, *supra* note 2 at para 12; Sixth Report, *supra* note 2 at paras 27-37.

<sup>18</sup> August 17 Affidavit, *ibid* at para 17; Sixth Report, *ibid*.

### C. The Transactions

18. As previously noted, on June 10, 2021, the Court granted the Approval and Vesting Orders approving the Transactions, and on June 28, 2021, the Applicants and the CIG Purchaser closed the CIG Transaction.<sup>19</sup>

19. Following the closing of the CIG Transaction, and in accordance with the June Ancillary Order, on July 8, 2021, the Applicants caused a distribution to be made to the DIP Lender in full satisfaction of their obligations owing under the DIP Loan including, but not limited to, outstanding principal, accrued interest, fees and expenses up and until July 8, 2021. As a result, there are no amounts currently owing by the Applicants to the DIP Lender.<sup>20</sup>

#### 1. the Norfolk Transaction<sup>21</sup>

20. As previously noted, on May 10, 2021, FIGR Norfolk entered into the Norfolk Sale Agreement with the Norfolk Purchaser.<sup>22</sup>

21. On or about June 29, 2021, FIGR Norfolk and the Norfolk Purchaser, with the consent of the DIP Lender and the Monitor, entered into the first amendment to the Norfolk Sale Agreement which, among other things:

- (a) extended the Outside Date from June 30, 2021 to July 30, 2021; and
- (b) amended Section 4.3 of the Norfolk Purchase Agreement to extend the date upon which the Financing Covenant needed to be satisfied to July 16, 2021.<sup>23</sup>

22. On or about August 9, 2021, FIGR Norfolk and the Norfolk Purchaser, with the consent of the DIP Lender and the Monitor, entered into the Second Amendment to the Norfolk Sale Agreement which, among other things, extended the Outside Date from July 30, 2021 to August 31, 2021.<sup>24</sup>

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<sup>19</sup> August 17 Affidavit, *ibid* at para 23; Sixth Report, *ibid* at paras 16-17.

<sup>20</sup> August 17 Affidavit, *ibid* at para 24; Sixth Report, *ibid* at para 47.

<sup>21</sup> Terms in this section not otherwise defined herein have the meanings scribed to them in the Norfolk Sale Agreement.

<sup>22</sup> August 17 Affidavit, *supra* note 2 at para 25.

<sup>23</sup> August 17 Affidavit, *ibid* at para 26; Sixth Report, *supra* note 2 at para 24.

<sup>24</sup> August 17 Affidavit, *ibid* at para 27; Sixth Report, *ibid* at para 25.



23. The parties continue to work diligently to close the Norfolk Transaction. The Applicants are hopeful that the necessary regulatory approvals will be received from Health Canada to allow the Norfolk Transaction to close prior to the August 31, 2021 Outside Date.<sup>25</sup>

#### **D. The Stay Extension**

24. Pursuant to the June Ancillary Order, the Court extended the Stay Period until and including September 3, 2021. Pursuant to the Norfolk KERP and Stay Extension Order, the Applicants are seeking an extension of the Stay Period until and including October 29, 2021.<sup>26</sup>

25. It is necessary and in the best interests of the Applicants and their stakeholders that the Stay Period be extended until and including October 29, 2021, as it will allow the Applicants and/or the Monitor to:

- (a) close the Norfolk Transaction;
- (b) advance and complete the Claims Procedure in accordance with the Claims Procedure Order;
- (c) advance and complete the Employee Claims Procedure in accordance with the Employee Claims Procedure Order;
- (d) advance matters relating to the Intercompany Charge, including an allocation of the DIP Loan obligations as between the Applicants; and
- (e) continue to advance matters toward making distributions to the creditors of the Applicants and bringing these CCAA Proceedings to an end.<sup>27</sup>

26. The Applicants are projected to have sufficient liquidity to fund their obligations and the costs of the CCAA Proceedings through the end of the Stay Extension.<sup>28</sup>

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<sup>25</sup> August 17 Affidavit, *ibid* at para 28; Sixth Report, *ibid* at para 26.

<sup>26</sup> August 17 Affidavit, *ibid* at para 29; Sixth Report, *ibid* at para 58.

<sup>27</sup> August 17 Affidavit, *ibid* at para 30; Sixth Report, *ibid*.

<sup>28</sup> August 17 Affidavit, *ibid* at para 31; Sixth Report, *supra* note 2 at para 60.

**E. The Norfolk KERP**

27. The Applicants are seeking approval of the Norfolk KERP, through which the Applicants propose to make retention payments to certain individuals employed at various levels by FIGR Norfolk (collectively, the "**Norfolk Key Employees**" and each a "**Norfolk Key Employee**"). The Norfolk KERP was developed with the assistance of the Monitor and in consultation the DIP Lender.<sup>29</sup>

28. Pursuant to the terms of the Norfolk KERP Agreement (each a "**KERP Agreement**" and together the "**KERP Agreements**") the Norfolk Key Employees are entitled to one (1) payment (the "**KERP Payment**") under the proposed Norfolk KERP within ten (10) days after the Norfolk Transaction closes only if the following conditions are met:

- (a) the Norfolk KERP and Stay Extension Order becomes a final order of the Court that is not subject to appeal;
- (b) the Norfolk Transaction Closing Date has occurred;
- (c) the relevant Norfolk Key Employee has remained an employee of FIGR Norfolk up to the Norfolk Transaction Closing Date and has not resigned (or provided notice of resignation) or been terminated for cause prior to Norfolk Transaction Closing Date; and
- (d) the relevant Norfolk Key Employee has not disclosed the terms of the Norfolk KERP or the underlying KERP Agreements to any person other than its personal financial advisor(s) and legal advisor(s), other than where required by law.<sup>30</sup>

29. The Applicants view the retention of the Norfolk Key Employees as essential to the successful restructuring efforts of the FIGR Group and the closing of the Norfolk Transaction. The FIGR Group believes that the Norfolk Key Employees are important to maintaining FIGR Norfolk's operations, and that they could not easily be replaced. Without the Norfolk KERP, the FIGR Group believes the Norfolk Key Employees would likely consider other options.<sup>31</sup> The

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<sup>29</sup> August 17 Affidavit, *ibid* at para 34; Sixth Report, *ibid* at para 49.

<sup>30</sup> August 17 Affidavit, *ibid* at para 35; Sixth Report, *ibid* at para 51.

<sup>31</sup> August 17 Affidavit, *ibid* at para 36; Sixth Report, *ibid* at para 55.

purpose of the Norfolk KERP is to provide the necessary incentive to the Norfolk Key Employees to remain as committed key members of FIGR Norfolk's management and operational teams during these CCAA Proceedings.<sup>32</sup> The Applicants note that if the Norfolk Transaction does not close, no amounts will be payable under the Norfolk KERP.

### **PART III: ISSUES**

30. The issues to be considered on this motion are whether:

- (a) this Court should extend the Stay Period;
- (b) this Court should approve the Norfolk KERP; and
- (c) this Court should seal the KERP Summary and KERP Agreements.

#### **A. The Stay Period Should be Extended**

##### **1. The Extension of the Stay Period is Appropriate in the Circumstances**

31. The Stay Period currently expires on September 3, 2021. Section 11.02(2) of the CCAA gives this Court the authority to grant an extension of the Stay Period for any period it "considers necessary".<sup>33</sup> To do so, this Court must be satisfied that circumstances exist that make the order appropriate and that the Applicants have acted, and are acting, in good faith and with due diligence.<sup>34</sup>

32. A stay of proceedings is appropriate where it provides the debtors with breathing room while they seek to restore their solvency and emerge from their restructuring on a going concern basis.<sup>35</sup> Further, a stay of proceedings will be appropriate where it advances the purposes of the CCAA – including avoiding the social and economic effects of bankruptcy.<sup>36</sup>

33. As detailed in the August 17 Affidavit and the Sixth Report, the Applicants, with the assistance of the Monitor, require the Stay Extension to, among other things:

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<sup>32</sup> August 17 Affidavit, *ibid* at para 37.

<sup>33</sup> *CCAA*, *supra* note 30 s 11.02(2).

<sup>34</sup> *Ibid.*

<sup>35</sup> *Century Services Inc v Attorney General (Canada)*, 2010 SCC 60 at para 14 [*Century Services*]; *Target Canada Co.*, 2015 ONSC 303 at para 8.

<sup>36</sup> *Century Services*, *ibid* at para 70.

- (a) close the Norfolk Transaction;
- (b) advance and complete the Claims Procedure in accordance with the Claims Procedure Order;
- (c) advance and complete the Employee Claims Procedure in accordance with the Employee Claims Procedure Order;
- (d) advance matters relating to the Intercompany Charge, including an allocation of the DIP Loan obligations as between the Applicants; and
- (e) continue to advance matters toward making distributions to the creditors of the Applicants and brining these CCAA Proceedings to an end.<sup>37</sup>

34. Since the granting of the Approval and Vesting Orders and the June Ancillary Order, the Applicants have acted and continue to act in good faith and with due diligence to, among other things, stabilize their business, close the CIG Transaction and assist with the SISP, the Claims Procedure and the Employee Claims Procedure, each with the view to maximizing value for their stakeholders.<sup>38</sup> The Monitor supports the requested extension to the Stay Period, and the Applicants are forecast to have sufficient liquidity to fund their obligations and the costs of the CCAA Proceedings through the end of the proposed extension.<sup>39</sup>

## **B. The Norfolk KERP Should be Approved**

35. The Norfolk KERP and Stay Extension Order seeks approval of the Norfolk KERP and the Applicants' authorization to make payments in accordance with the terms thereof.

36. This Court has discretion to approve the Norfolk KERP pursuant to its jurisdiction under section 11 of the CCAA to grant "any order it considers appropriate in the circumstances".<sup>40</sup> Courts have frequently exercised their discretion to approve key employee retention plans where "the retention of certain employees has been deemed critical to a successful restructuring".<sup>41</sup>

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<sup>37</sup> August 17 Affidavit, *supra* note 2 at para 30; Sixth Report, *supra* note 2 at para 58.

<sup>38</sup> August 17 Affidavit, *ibid* at para 20; Sixth Report, *ibid* at para 62.

<sup>39</sup> August 17 Affidavit, *ibid* at para 31; Sixth Report, *ibid* at paras 60-62.

<sup>40</sup> CCAA, *supra* note 30 s 11.

<sup>41</sup> *Timminco Limited (Re)*, 2012 ONSC 506 at para 72 [*Timminco*].

37. In *Cinram International Inc., Re*, Morawetz J. (as he then was) summarized the factors to be considered in determining whether to approve a key employee retention plan, including:

- (a) whether the monitor supports the key employee retention plan;
- (b) whether the continued employment of the employees to which the key employee retention plan applies is important for the stability of the business and to enhance the effectiveness of a marketing process;
- (c) the employees' history and knowledge of the debtor;
- (d) the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the key employee retention plan applies;
- (e) whether the key employee retention plan was approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;
- (f) whether the key employee retention plan is supported or consented to by the secured creditors of the debtor; and
- (g) whether the payments under the key employee retention plan are payable upon the completion of the restructuring process.<sup>42</sup>

38. In considering these factors, courts have stated that the "business judgment of the board of directors of the debtor company and the monitor should rarely be ignored".<sup>43</sup>

39. Having regard to the above factors, the following supports the granting of the Norfolk KERP:

- (a) the Norfolk KERP was developed with the assistance of the Monitor, and the Monitor is supportive of it;

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<sup>42</sup> [Cinram International Inc. \(Re\), 2012 ONSC 3767](#) at para 37, Schedule "C" at para 91; [Aralez Pharmaceuticals Inc. \(Re\), 2018 ONSC 6980](#) at para 29 [Aralez].

<sup>43</sup> [Aralez](#), *ibid* at para 29; [Timminco](#), *supra* note 43 at para 73.

- (b) absent the approval of the Norfolk KERP, the Norfolk Key Employees are likely to consider other employment options;
- (c) the Norfolk Key Employees have historical knowledge of, and familiarity with, FIGR Norfolk's business and operations, and significant experience and expertise;
- (d) the total quantum of the Norfolk KERP is relatively modest;
- (e) the Norfolk KERP has been authorized by FIGR Norfolk's board;
- (f) the Norfolk Key Employees have historical knowledge of, and familiarity with, FIGR Norfolk's business and operations, which is in a highly regulated industry, and their significant experience and expertise cannot be easily replaced, particularly during the CCAA Proceedings;
- (g) none of the Norfolk Key Employees could be readily or easily replaced internally and the process to find appropriately qualified replacements for the Norfolk Key Employees externally would be lengthy, difficult, costly and an impediment to the Norfolk Transaction;
- (h) the KERP Payment will facilitate the continued participation of the Norfolk Key Employees until the Norfolk Transaction closes; and
- (i) the retention of certain of the Norfolk Key Employees is essential to maintaining FIGR Norfolk's licenses with Health Canada.<sup>44</sup>

40. In light of the foregoing, the Applicants submit that the Norfolk KERP is reasonable and appropriate in the circumstances.

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<sup>44</sup> August 17 Affidavit, *supra* note 2 at para 36; Sixth Report, *supra* note 2 at para 50.

### C. The KERP Summary and KERP Agreements Should be Sealed

41. Pursuant to subsection 137(2) of the *Courts of Justice Act*, R.S.O. c. C.43, as amended, the Applicants are also requesting that this Court seal the KERP Summary and the KERP Agreements attached as the Confidential Appendix to the Sixth Report.<sup>45</sup>

42. In *Sierra Club*, as recast in *Sherman Estate*, the test to determine if a sealing order should be granted requires consideration of whether:

- (a) court openness poses a serious risk to an important public interest;
- (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.<sup>46</sup>

43. The Courts in *Sierra Club* and *Sherman Estate* explicitly recognized that commercial interests such as preserving confidential information or avoiding a breach of a confidentiality agreement are an "important public interest" for the purposes of the aforementioned test.<sup>47</sup>

44. Courts have routinely applied the *Sierra Club* and *Sherman Estate* tests in the insolvency context and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors.<sup>48</sup>

45. In this case, the KERP Summary and the KERP Agreements reveal individually identifiable information, including, among other things, compensation information. Disclosure of such sensitive personal and compensation information may cause harm to the Norfolk Key Employees and to the Applicants, and the protection of such information is an important commercial and privacy interest that should be protected.<sup>49</sup>

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<sup>45</sup> *Courts of Justice Act*, RSO 1990, c. C. 43, s 137(2).

<sup>46</sup> *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53 [*Sierra Club*]; *Sherman Estate v. Donovan*, 2021 SCC 25 at paras 38 and 43 [*Sherman Estate*].

<sup>47</sup> *Sierra Club* *ibid* at para 55; *Sherman Estate* *ibid* at paras 41-43.

<sup>48</sup> *Re Danier Leather Inc.*, 2016 ONSC 1044 at para 82; *Ontario Security Commission v. Bridging Finance Inc.*, 2021 ONSC 4347 at paras. 23-28; *Re Essar Steel Algoma Inc et al.*, 2015 ONSC 7656 at para 22 where Newbould J. stated that "[s]ealing orders are routinely granted in KERP cases".

<sup>49</sup> August 17 Affidavit, *supra* note 2 at paras 38 and 40.

46. The Norfolk Key Employees have a reasonable expectation that their personal information will be kept confidential. Further, given that the material terms of the Norfolk KERP have been disclosed within the Sixth Report and the August 17 Affidavit, the salutary effects of the proposed sealing order outweigh any deleterious effects.<sup>50</sup>

47. The Monitor is supportive of the sealing of the KERP Summary and the KERP Agreements.<sup>51</sup>

**PART IV: RELIEF REQUESTED**

48. The Applicants submit that they meet all of the qualifications required to obtain the requested relief and request that this Court grant the proposed form of Norfolk KERP and Stay Extension Order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

*Bennett Jones LLP*  
Name \_\_\_\_\_

August 20, 2021

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<sup>50</sup> August 17 Affidavit, *ibid* at para 41.

<sup>51</sup> August 17 Affidavit, *ibid* at para 41- 42; Sixth Report, *supra* note 2 at para 70.



**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

*Cases Cited*

1. [\*Aralez Pharmaceuticals Inc, \(Re\)\*, 2018 ONSC 6980](#)
2. [\*Century Services Inc v Attorney General \(Canada\)\*, 2010 SCC 60](#)
3. [\*Cinram International Inc. \(Re\)\*, 2012 ONSC 3767](#)
4. [\*Ontario Security Commission v. Bridging Finance Inc.\*, 2021 ONSC 4347](#)
5. [\*Re Danier Leather Inc.\*, 2016 ONSC 1044](#)
6. [\*Re Essar Steel Algoma Inc et al\*, 2015 ONSC 7656](#)
7. [\*Sherman Estate v. Donovan\*, 2021 SCC 25](#)
8. [\*Sierra Club of Canada v Canada \(Minister of Finance\)\*, 2002 SCC 41](#)
9. [\*Target Canada Co\*, 2015 ONSC 303](#)
10. [\*Timminco Ltd, Re\*, 2012 ONSC 506](#)

**SCHEDULE "B"**  
**STATUTES RELIED ON**

**Companies' Creditors Arrangement Act, R.S.C. 1985, c C-36**

**Section 11**

**General Power of Court**

Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

**Section 11.02**

**Stays, etc. – initial application**

(1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

**Stays, etc. — other than initial application**

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

**Burden of proof on application**

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

**Restriction**

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

**Courts of Justice Act, R.S.O. 1990, c. C.43**

**Documents public**

137 (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

**Sealing documents**

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

**Court lists public**

(3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

**Copies**

(4) On payment of the prescribed fee, a person is entitled to a copy of any document the person is entitled to see. R.S.O. 1990, c. C.43, s. 137.

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND  
IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF FIGR BRANDS, INC., FIGR NORFOLK  
INC. AND 1307849 B.C. LTD.**

Court File No.: CV-21-00655373-00CL

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***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**

Proceedings Commenced in Toronto

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